GENISYS INTEGRATED ENGINEERS PTE LTD

v.

UEM GENISYS SDN BHD & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[SUITS NO: D5 (D9)-26-43-2000 & D3-26-29-2001]
20 OCTOBER 2005

COMPANY LAW: *Directors - Fiduciary duties - Personal financial gains of directors to be disclosed to and authorised by Board of Directors - Whether secret profits made - Rights of members to ensure that directors act in accordance with their fiduciary obligations and not to make secret profits - Whether breach of no-profit rule and fiduciary duty amounts to an oppressive conduct*

COMPANY LAW: *Directors - Disclosure of interest in contract - Whether s. 131 of Companies Act 1965 contravened - Director's personal interest in contract awarded by company not disclosed to Board of Directors - Whether amounts to clear disregard of interest of company, its Board of Directors and shareholders*

COMPANY LAW: *Directors - Powers of directors - Whether directors acted reasonably in interest of company in carrying out wishes of all shareholders - Honesty and reasonable diligence - Company's interest to be paramount consideration - Director's conduct not to depart from standards of fair dealings and principle of fair play*

COMPANY LAW: *Members' rights - Oppression - Petition under s. 181 Companies Act 1965 - Test of whether conduct falls within s. 181 - Objective test*

COMPANY LAW: *Members' rights - Oppression - Petition under s. 181 Companies Act 1965 - Financial irregularities and mismanagement - Allegation of - Whether proved - Whether there were sufficient grounds to show affairs of Company exercised in manner oppressive to petitioner - Whether in total disregard of petitioner's interest as member or shareholder - Right of company and its members to ensure integrity of its assets and that funds are not misappropriated - Denial of director's access to office and documents - Conduct contrary to legitimate expectations of shareholders*

The petitioner (in D9 Suit), Genisys Integrated Engineers Pte. Ltd. (GIE) was a 49% shareholder in UEM Genisys Sdn Bhd (UEG) (the 1st respondent). UEG was formed by GIE and the 2nd respondent, United Engineers (Malaysia) Bhd (UEM). The parties had agreed that the number of directors in UEG shall be 4, made up of 2 nominees from UEM and 2 nominees from GIE. The 3rd and 4th respondents

were the UEM nominated directors to UEG's Board of Directors. GIE complained of oppressive conducts, conducts in disregard of interest or unfairly discriminatory or prejudicial conducts on the part of the respondents, within the meaning of s. 181 of the Companies Act 1965 (the Act). The oppressive conducts complained of by GIE were, *inter alia:* (i) denying GlE's right to appoint it's own nominee director in UEG; (ii) attempt by UEM to sell it's shares in UEG to 3rd party; (iii) attempt by UEM to wind-up UEG; (iv) attempt by UEM to remove Seow Boon Cheng (Seow), a director of UEG nominated by GIE, who was also the CEO of UEG and majority shareholder of GIE; and (v) failure on the part of UEM to rectify the shareholders' agreement between GIE and UEM. Therefore, GIE, *inter alia*, prayed for an order that GIE be allowed to purchase all shares in UEG held by UEM at Net Tangible Assets valued at 31 December 1999;

The petitioner (in D3 Suit) was UEM and the respondents were UEG and GIE. UEM was the 51% shareholder of UEG. UEM complained that the affairs of UEG (managed and controlled by Seow, GIE's nominated director in UEG) were being conducted in a manner contrary to s. 181 of the Act. The relevant conducts complained by UEM, *inter alia*, were as follows: (i) misappropriation of UEG's funds and criminal breach of trust allegedly committed by Seow; (ii) breach of non-profit rule and fiduciary duty by Ms. Christina Rani (another GlE's nominated director in UEG); (iii) secret profits and breach of s. 131 of the Act allegedly committed by Seow; (iv) irregular payments made by Seow, allegedly on behalf of GIE; (v) the management of UEG's financial affairs in a manner wholly lacking in financial probity; (vi) lack of diligence and probity in the management of UEG by GlE's nominated directors; (vii) management of UEG with total disregard of the Board of Directors; (viii) obstruction of UEM from appointing it's nominated director in UEG; and (ix) incitement of staff against the directors of UEG nominated by UEM. Therefore, UEM prayed for the winding-up of UEG or alternatively, if winding-up of UEG was inappropriate, for GlE's shares in UEG to be sold to UEM.

Both D9 Suit and D3 Suit were consolidated and heard together.

Held (dismissing the D9 Suit with costs and allowing the D3 suit with costs):

(1) Whether a case under s. 181 is made out or not is to be decided on a case by case basis. The test of whether a conduct falls within s. 181 is an objective one. (para 10)

(2) A director owes a duty to the company which he directs to act honestly and with reasonable degree of care in the performance of his function as a director. The company's interest must be the

paramount consideration. UEM and it's nominated directors in UEG had not displayed any conduct that visibly departed from standards of fair dealings or that violated the principle of fair play as alleged by GIE. (para 24)

(3) A company and its members have a right to ensure the integrity of its assets and that its funds are not misappropriated or diverted. The interests of the shareholders of UEG were at risks because UEG had been in effect siphoned of its money. The misappropriation of funds was a result of the affairs of UEG being conducted in an oppressive manner and with disregard to the interest of UEM as a shareholder of UEG and therefore contrary to s. 181 of the Act. (para 48)

(4) A director of a company is a fiduciary and in order for a director to receive payment, such payment must be disclosed to and authorised by the Board of Directors. Where secret profits are made and where fiduciary obligations are breached, then this may result in the assets of the company being at risk. Members or shareholders of a company have a right to ensure that the directors of the company act in accordance with their fiduciary obligations and not to make secret profits from the company. In the present case, there was breach of no-profit rule and fiduciary duty. Such act may amount to an oppressive conduct done in total disregard of the interest of the company as well as the shareholders. (para 50)

(5) There were no record of any declarations ever having been made by Seow to inform the Board of Directors that he was the beneficial owner of the shares in Metronics, a company which at the material time, was being awarded contracts by UEG. Seow had acted in breach of s. 131 of the Act. This obviously amounted to clear disregard of the interest of the company, its Board of Directors as well as the shareholders. (para 54)

(6) UEM's interest as a shareholder/member of UEG were oppressed as the assets of UEG had been applied for GIE's purposes. Further, the denial of access to the office and the documents of UEG to the Directors of UEG nominated by UEM was also gravely oppressive. This was contrary to the legitimate expectations of UEM, as evidenced in the shareholders' agreement that it would be allowed to participate in the management of UEG. (paras 62 & 72)

Case(s) referred to:

Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors [1999] 7 CLJ 1 HC ***(refd)***

David Hoy v. New Kok Ann Realty Sdn Bhd [1984] 1 LNS 51 ***(refd)***

Elder & Ors v. Elder & Watson Ltd [1952] S 49 ***(refd)***

Jaya Medical Consultants Sdn Bhd v. Island & Peninsular Bhd & Ors [1994] 1 MLJ 520 ***(refd)***

Lords and Another v. John Blackwood Limited [1924] AC 783 ***(refd)***

Low Tien Sang & Sons Holding Sdn Bhd & Ors v. How Kem Chin & Ors [2000] 2 MLJ 334 ***(refd)***

Re a Company [1990] BCLC 384 ***(refd)***

Re Elgindata Ltd [1991] BCLC 959 ***(refd)***

Re HR Hermer Ltd [1958] All ER 689 ***(refd)***

Re Kong Thai Sawmill (Miri) Sdn Bhd v. Ling Bong Sung [1978] 2 MLJ 227 ***(refd)***

Re RA Noble and Sons (Clothing) Ltd [1983] BCLC 273 ***(refd)***

Re Steaward (Bixton) Ltd [1985] BCLC 4 ***(refd)***

Re Smith and Fawcett Ltd [1942] All ER 542 ***(refd)***

Tan Kian Hua v. Colours Image Scan Sdn Bhd [2004] 6 CLJ 174 HC ***(refd)***

Tuan Hj Ishak Ismail & Ors v. Leong Hup Holdings Bhd and Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 131, 181(1)(a)

Evidence Act 1950, s. 114(g)

Companies Act 1948 [UK], s. 210

Other source(s) referred:

Sarkar's Law of Evidence, 15th edn, vol 1

(D9 Suit)

For the petitioner (GIE) - Dato' Loh Siew Cheong (Kelvin Seet with him); M/s Cheong & Ariff

For the 2nd respondent - Tan Sri Zaki Tun Azmi (Mohd Hasfarizam & Yvonne Teo with him); M/s Shahrizat Rashid & Lee

For the 3rd & 4th respondents - Malik Imtiaz (HL Ang with him); M/s Malik Imtiaz Sarwar

(D3 Suit)

For the petitioner (UEM) - Dominic Puthucheary (Firoz Husein, MS Wong & Cheong Mai with him); M/s Puthucheary, Firoz & Mai

For the respondent (GIE) - Raja Aziz Addruse (Gideon Tan & YC Chum with him); M/s Gideon Tan Razali Zaini

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali J:

[1] These grounds of judgment are in relation to Suit No. D5(D9)26-43-2000 (D9 Suit) consolidated with Suit No. D3-26-29-2001 (D3 Suit). In D9 Suit' the petitioner is Genisys Integrated Engineers Pte. Ltd. (GIE), a 49% shareholder in UEM Genisys Sdn. Bhd. (UEG). The 1st respondent (UEG) is a company formed by GIE and the 2nd respondent (UEM). The 3rd and 4th respondents are the UEM nominated directors to UEG's Board of Directors. The 5th respondent is the company secretary to UEG and at the material times, a director of UEM. The 6th respondent is a former director of UEG nominated by *GIE*, who was formerly a shareholder and director of GIE. In this D9 Suit the petitioner (GIE) complained of oppressive conducts, conducts in disregard of interest or unfairly discriminatory or prejudicial conducts on the part of the respondents, within the meaning of s. 181 of the Companies Act 1965. The oppressive conducts on the part of the Respondents (particularly UEM) as complained by GIE (among others) are as follows:

(i) denying GlE's right to appoint it's own nominee director in UEG;

(ii) attempt by UEM to sell it's shares in UEG to 3rd party;

(iii) attempt by UEM to wind-up UEG;

(iv) attempt by UEM to remove Seow Boon Cheng (Seow), a director of UEG nominated by GIE, who is also the CEO of UEG and majority shareholder of GIE; and

(v) failure on the part of UEM to rectify the shareholders' agreement between GIE and UEM.

[2] Therefore, GIE (as the petitioner in D9 Suit) prays for the following order:

(a) that the petitioner (GIE) purchase all shares in 1st respondent (UEG) held by the 2nd respondent (UEM) at net tangible assets valued at 31 December 1999;

(b) the 1st respondent's auditor, Messrs. Ernst & Young shall, within seven days upon this court making an order for the petitioner (GIE) to purchase the shares in the 1st respondent held by the 2nd respondent (UEM), confirm in writing the aforesaid net tangible assets value based on the draft 1999 audited accounts of the 1st respondent and therefrom the purchase price payable by the

petitioner (GIE) to the 2nd respondent for the said purchase of shares, and the costs incurred by Messrs. Ernst & Young herein shall be borne by the 1st respondent;

(c) that such purchase be completed within two months from the date of the order in the following manner:

(i) the petitioner, (GIE) shall pay the purchase price within the time specified;

(ii) the 2nd respondent, shall execute all necessary documents to effect the transfer of their shares in the 1st respondent to the petitioner (GIE) and shall forward the same forthwith to the petitioner (GIE) upon receipt of the payment of the purchase price by the petitioner (GIE);

(d) the 3rd and 4th respondent and their alternate directors (if any) shall forthwith resign their positions as directors of the 1st respondent upon the court making an order that the petitioner shall purchase the share of the 1st respondent held by the 2nd respondent;

(e) costs to be borne by the respondents (other than the 1st respondent).

[3] In D3 Suit, the petitioner is United Engineers (Malaysia) Bhd. (UEM) and the respondents are UEG and GIE. The petitioner, (UEM) is the shareholder 51% of UEG (while GIE holds the remaining 49% shares in UEG). In this D3 Suit, UEM (as the petitioner) complained that the affairs of UEG (managed and controlled by Seow GlE's nominated director in UEG) are being conducted in a manner contrary to s. 181 of the Companies Act 1965. The relevant conducts complained by UEM (among others) are as follows:

(i) misappropriation of UEG's funds and criminal breach of trust allegedly committed by Seow (GlE's nominated director in UEG);

(ii) breach of no-profit rule and fiduciary duty by Ms. Christina Rani (another GlE's nominated director in UEG);

(iii) secret profits and breach of s. 131 of the Companies Act 1965 allegedly committed by Seow;

(iv) irregular payments made by Seow, allegedly on behalf of GIE;

(v) the management of UEG's financial affairs in a manner wholly lacking in financial probity;

(vi) lack of diligence and probity in the management of UEG by GlE's nominated directors;

(vii) management of UEG with total disregard of the Board of Directors;

(viii) obstruction of UEM from appointing it's nominated director in UEG; and

(ix) incitement of staff against the directors of UEG nominated by UEM.

[4] Therefore, in this D3 Suit, UEM (as the petitioner) seeks the following reliefs:

(a) winding-up of UEG;

(b) alternatively, if winding-up of UEG, is inappropriate, then GlE's shares in UEG should be sold to UEM; and

(c) costs.

[5] Both D9 Suit and D3 Suit were consolidated and heard together. Apparently both petitioners (GIE and UEM) in both suits rely on the same provisions of laws ie, s. 181 of the Companies Act 1965.

Factual Backgrounds

[6] The subject matter of the disputes between GIE and UEM in this case is UEM Genisys Sdn. Bhd. (UEG). UEG was formed as a joint venture company pursuant to as shareholders' agreement dated 3 November 1993 whereby UEM holds 51% of the shares and GIE holds 49%. From the time of inception until UEM's decision to exit the joint venture on 21 July 1998, the parties conducted themselves and the affairs of UEG in accordance with the shareholders' agreement. UEG was formed for the purpose of establishing a joint venture to undertake mechanical and electrical contract works. UEG commenced operation and was awarded a considerable amount of contract works by UEM and its related companies. The work in progress, as captured in the audited accounts of UEG for the financial year ending 31 December 1998, amounted to RM541,565,914. Despite the generous award of contracts to UEG, it has never paid any dividends to its shareholders. The actual management and control of UEG has been, since its inceptions, in the hands of its directors nominated by GIE. Seow Boon Cheng (Seow) has been managing and continues to manage UEG. (Seow was appointed the CEO of UEG. He is also the managing director and majority shareholder of GIE). UEM and its management placed great trust in Seow to manage UEG with minimum level of interference either from UEM or its nominee directors.

[7] As agreed by the parties, the number of directors in UEG shall be four, made up of two nominees from UEM and two nominees from GIE. The parties also agreed that each party shall have the exclusive

A right to determine the period their nominee directors will hold office and at any time to remove any or all of them and to nominate another in his place. It was also agreed that one of the directors nominated by UEM shall be the chairman of the board of directors, who shall have no costing vote. The shareholders' agreement also provides that all
B decision of the board of directors shall be decided by a majority of votes.

The Law Relating To s. 181(1) Of The Companies Act 1965

[8] Section 181(1) of the Act is a wide provision. In *Re Kong Thai*
C *Sawmill (Miri) Sdn. Bhd. v. Ling Bong Sung* [1978] 2 MLJ 227, the Privy Council expressed an opinion that s. 181 was wider in scope than the previous comparable UK sections ie, s. 210 of the UK Companies Act 1948. Lord Wilberforce in giving the leading judgment stated that:

> D The Malaysian section, on the other hand requires (under sub-section 1(a) a finding of "oppression" or 'disregard", and then leaves to the Court a wide discretion as to the relief which it may grant, including among the options that of winding the company up.

His lordship then stated:

> E Secondly, for the case to be brought within s. 181(1)(a) at all, the complaint must identify and prove "oppression" or "disregard". The mere fact that one or more of those managing the company posses a majority of the voting power and, in reliance upon that power, make a policy or executive decisions, with which the complainant does not
> F agree, is not enough. Those who take interest in companies limited by shares have to accept majority rule. It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interest, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair
> G play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd*); their Lordships would place the emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the
> H proper company procedure (per Lord Clyde in *Thompson v. Drysdale*).

[9] Whether a case under s. 181 is made out or not is to be decided on a case by case basis. In *Jaya Medical Consultants Sdn. Bhd. v. Island & Peninsular Bhd. & Ors.* [1994] 1 MLJ 520, Siti Norma Yaakob J (now CJM) held:

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> As it is quite impossible to lay down categories of conduct considered to be oppressive, each case has to be examined in light of its own particular facts and thus the particular types of conduct complained of in the cases cited merely tend to illustrate whether such conduct can be regarded in law to be oppressive. From those cases, it is sufficient for me to conclude that oppression does not necessarily mean illegal or fraudulent, nor does it require fraud. For there to be oppression, there must be a departure from the standard of fair dealing or fair play …

[10] The test of whether conduct falls within s. 181 is an objective one. In *Re RA Noble and Sons (Clothing) Ltd.* [1983] BCLC 273, Novrse. adopted the test laid down by Glade J in *Re Bovrey Hotel Ventures Ltd.* At p. 290, it was said:

> The test of unfairness must, I think, be an objective, not a subjective, one. In other words, it is not necessary for the petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interest.

[11] The same objective test for unfairness was adopted by Siti Norma Yaakob, (now CJM) in *Jaya Medical Consultant Sdn. Bhd.* case, referring, at p. 536 E-H, in particular, to the Australian case of *Wayde & Anor v. New South Wales Rugby League Ltd.*

[12] In *Chan & Koh's Company Law*, the authors have taken the view that s. 181 is capable of creating the following 8 separate grounds, namely:

1. Oppression

   (a) that the affairs of the company are being conducted in a manner "oppressive" to one or more of the members including the Petitioner; or

   (b) that the powers of the directors are being exercised in a manner "oppressive" in one or more of the members including the Petitioner.

2. Disregard of interest

   (c) that the affairs of the company are being exercised in "disregard" of the petitioner's interest as a member of the company; or

   (d) that the powers of the directors are being exercised in "disregard" of the Petitioner's interest as a member of the company.

A 3. Unfair discrimination

(e) that some act of the company has been done or is threatened which "unfairly discriminates" against one or more of the members including the Petitioner; or

B (f) that some resolution of the members or any class of them has been passed or is propose which "infairly discriminates" against one or more of the members including the Petitioner.

4. Prejudice

C (g) that some act of the company has been done or is threatened which is otherwise "prejudicial" to one or more of the members including the Petitioner or

(h) that some resolutions of the members or any class of them has been passed or is proposed which is otherwise "prejudicial" to one or more of the members including the D petitioner.

[13] Applying the criteria set out above, the court shall now deal with the petition, one by one.

E **D9 Suit**

[14] The oppressive conducts on the part of the respondents, (particularly UEM) as complained by GIE (the petitioner in D9 Suit) are as follows:

F (d) denying GlE's right to appoint its own nominee director in UEG;

(ii) attempt by UEM to sell its shares in UEG to 3rd party;

(iii) attempt by UEM to remove Seow Boon Cheng (Seow), a director of UEG nominated by GIE, who is also the CEO of UEG and G majority shareholder of GIE;

(iv) attempt by UEM to remove Seow Boon Cheng (Seow), a director of UEG nominated by GIE, who is also the CEO of UEG and majority shareholder of GIE;

H (vi) failure on the part of UEM to ratify the shareholders' agreement.

1st Complaint – Denying GlE's Right to Appoint It's Own Nominee Director

[15] In or about the month of August 1999, disagreements arose I between shareholders of GIE in Singapore. The feuding parties were, among others, the 6th respondent (Mr. Soh Lup Chee) and Seow. The disagreements led to the filing of Originating Summons Suit No. 1902

of 1999 in Singapore High Court (the Singapore Suit). The Singapore Suit was settled between the parties by way of a consent judgment dated 7 July 2000. A term of the consent judgment required the 6th respondent to cease from being a director nominated by GIE in UEG "upon the valuation (of the shares of GIE) being completed and the price ascertained by the valuer" appointed by the Singapore Court, Mr. Don Ho.

[16] At a board of directors meeting (of UEG) held on 27 July 2000, Seow (representing GIE) gave notice of GlE's intention to remove the 6th respondent from the board and appoint Miss Christina Rani in his stand. (In that meeting, the 6th respondent and Miss Christina Rani were present). The said meeting was adjourned to enable the 4th respondent (director nominated by UEM) to seek instruction from UEM on that issue.

[17] GIE claimed that by a letter dated 11 August 2000, Don Ho informed the parties that "the valuation is complete and price has been ascertained". GIE also claimed that there were further letters from Don Ho dated 14 August 2000 and 18 August 2000 stating *inter alia* that "the valuation is complete and price has been ascertained."

[18] On 21 August 2000, GIE forwarded another notice to remove the 6th respondent as it's nominee director and to replace him with Miss Christina. There was no response from the UEM nominated director. On 25 August 2000 at the 4th board meeting of UEG, the 6th respondent presented himself "as a director representing GIE". This was challenged by Seow.

[19] GIE alleged that, despite objections by Seow, both 3rd and 4th respondent (director nominated by UEM) continue to recognise the 6th respondent as a director of UEG in breach of cll. 7.1 and 7.5 of the shareholders agreement. GIE argued that deliberately ignoring the rights of GIE under the shareholders' agreement to remove and appoint it's nominee directors, UEM's nominated directors with the active connivance of Soh Lup Chee displayed conduct that visibly depart from standards of fair dealings and violated the principles of fair play.

[20] On the evidence, this court finds that at the 3rd board meeting of UEG on 27 July 2000 the 4th respondent (who chaired the meeting) informed the meeting that the 6th respondent had forwarded her a copy of the Singapore consent judgment and at the same meeting, Seow representing GIE, gave notice of GlE's intention to remove the 6th respondent from the board and appoint Miss Christina Rani in his stead. The effect of the Singapore consent judgment is that the 6th respondent

will cease from being a director nominated by GIE in UEG "upon the valuation (of the shares of GIE) being completed and the price ascertained by the valuer."

The 4th respondent (the chairperson of the 3rd board meeting on 27 July 2000) correctly adjourned the matter, to enable her to seek instruction from UEM and to seek advice on the issue in question. There was no indication at all to show that GlE's request was dismissed or rejected. Furthermore, as at that date (27 July 2000) there was no indication to show that "the valuation of the shares of GIE being completed and the price ascertained by the valuer" as stipulated in the Singapore consent judgment being the condition precedent for the 6th respondent to cease from being a director of UEG. It is not proper for GIE or Seow to request for removal of the 6th respondent as a director nominated by GIE in UEG at that time (*vide* a notice dated 27 July 2000), having full knowledge that the valuation of GIE shares was not completed and prices not ascertained.

[21] The 2nd attempt by GIE or Seow to request for removal of the 6th respondent from UEG board of directors was made when another notice to that effect was served on UEM on 21 August 2000. At the 4th board meeting of UEG held on 25 August 2000, Seow made another request to remove the 6th respondent.

[22] The chairperson (the 4th respondent) in that meeting on 25 August 2000 indicated to Seow that since the members' resolution on the removal of the 6th respondent as director made mention of the Singapore consent order and was made on the basis, *inter alia* of the court order, thus the chairperson would be placed in a position to determine the conclusiveness of the valuation letter. The evidence shows that as at 25 February 2000 the valuation of GlE's shares was not completed and price not ascertained yet. In his evidence (during cross-examination at pages 21-39 of the notes of evidence) Seow admitted that in none of the letters dated 11 August 2000, 14 August 2000 and 18 August 2000 from Don Ho has valuation been completed and price been ascertained.

The evidence also shows that the true and exact date where valuation has been completed and price ascertained was on 18 September 2000 (after the meeting held on 25 August 2000). This was also admitted by Seow in his evidence.

[23] Can the conduct of the chairperson (4th respondent) in this circumstances be said to oppressive?

[24] The court is of the view that GlE's right in removing the 6th respondent under the shareholders' agreement were never breached. The blame should not be placed on the chairperson (4th respondent) in her conduct in determining the conclusiveness of the valuation letter as she was acting in the best interest of the company (EUG). After all, Seow had agreed that the Singapore consent order had qualified the shareholders agreement with respect to the removal/appointment of directors. It was reasonable for the board of directors of UEG to give due and careful consideration about the proposal to remove the 6th respondent from the board. They have to strictly comply with the terms of the Singapore consent judgment in order to avoid any cause of action against the company if the 6th respondent is wrongly removed or to avoid any breach of the terms of the said judgment in order not to be found to be aiding or abetting a contempt. Clearly, the directors nominated by EUM in this case (the 3rd and 4th respondents) had acted *bona fide* and good faith by seeking legal advice with regardsto the matter *vis-a-vis* the Singapore consent order. A director owes a duty to the company which he directs to act honestly and with reasonable degree of care in the performance of this function as a director. The company's interest must be the paramount consideration. In handling this matter, UEM and it's nominated directors in UEG had not displayed any conduct that visibly depart from standards of fair dealings and violated the principle of fair play as alleged by GIE. The 4th respondent (as the chairperson of the board meeting) was only exercising her role to act what was best for the company (UEG).

[25] In the case of *Low Tien Sang & Sons Holding Sdn. Bhd. & Ors. v. How Kern Chin & Ors.* [2000] 2 MLJ 334, the court expounded what constitutes 'visible departure from fair dealings" as follow:

> In *Elder & Ors. v. Elder & Watson Ltd.* [1952] s. 49, with regard to the phrase 'oppressive to some part of the members' found in **s** 210 of the English Companies Act 1948 (which is the evidence of s. 181 of our Act), Lord President (Cooper) said (at page 113) ... the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.
>
> For there to be oppression, there must be a visible departure from the standard of fair dealing or fair play and where the oppressed is constrained to submit to some overbearing act or attitude on the part of the oppressor. Similarly, 'disregard' involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or set at naught the proper company procedure, per Lord Wilberforce in *Re Kong That Sawmill.*

Also in the case of *Tuan Hj Ishak Ismail & Ors. v. Leong Hup Holdings Bhd. and Other Appeals* [1996] 1 CLJ 393 CA, the court held that:

> ... there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder v. Elder & Watson Ltd.* [1952] SC 49) ... Neither 'oppression' nor 'disregard' need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.

From the above considerations, the court is convinced that UEM or it's nominated directors in UEG did not override GlE's right to remove and appoint its nominated director but had exercised their duty as a director and adhered to the Singapore consent judgment. Such actions were made in good faith for the interest of the company (UEG). It is difficult to comprehend how UEM's conduct in this matter would amount to a visible departure from standards of fair play or that she had "crossed the line".

2nd Complaint – Attempt By UEM To Sell Its Shares In UEG To 3rd Party

[26] GIE complained that UEM, as early as 21 January 1998, had the intention to exit from the joint venture by selling its 51% stake in UEG. GIE argued that if at all UEM has such an intention, then UEM should first offer its 51% stake to its sole partner, ie, GIE, as GIE has pre-emption rights pursuant to cl. 12.3 of the shareholders' agreement. Instead, UEM negotiated the terms of the sale of it's 51% stake in UEG at par value of RM1 per share to a 3rd party, namely, Nova Nusantara Sdn. Bhd. and then *vide* it's letter dated 21 July 1998 requested GIE to waive their rights of pre-emption.

[27] The evidence shows that UEM had first offered to sell it's 51% stake in UEG to GIE for cash consideration of RM10.71 per share subject to further details to be agreed upon. However, this negotiation failed because Seow did not respond to the offer.

[28] The evidence also shows that, UEM had also negotiated with Nova Nusantara Sdn. Bhd. of the possibility of disposing its entire shares in UEG and that UEM *vide* its letter dated 21 July 1998, (sought for GlE's consent pursuant to the Shareholders' Agreement. It is also not disputed that, apart from the purchase price being RM1 per share, there is also "special condition attached to it" namely - UEM will be paid by Nova Nusantara Sdn. Bhd., upon successful listing of UEG on the stock exchange (KLSE), the sum equivalent to 50% of the net

listing profit. It is also evidence that pursuant to UEM's review of it's core and non-core business, it was established that UEG was no longer considered as UEM's core business and therefore it is only logical that UEM dispose its shares in UEG to potential and willing buyer – ie, Nova Nusantara Sdn. Bhd. This is purely commercial transaction. Seow in his evidence (at pp. 84 and 92 of the notes of proceedings) admitted that the sale and purchase of shares in UEG is purely commercial and was conducted on an arms-length basis. There are evidences to show that by end of 2000, UEM felt that UEG was no longer of value as it gave no returns of investment of UEM) and had considered the option of winding it up. According to DW3, who was then the managing director of UEM that UEM had given out contracts of UEG in excess of RM300 million, all in all, eversince UEG was formed. UEM had not received any benefit from UEG. No returns and no dividends were given out by UEG to UEM as shareholder. Not even a cent of dividends. The management of UEG was also very uncooperative with UEM. Audited accounts were not forthcoming. UEM also had problems with sub-contractors when they complained to UEM that UEG had not paid them their payments.

[29] DW3's evidence also shows that towards the end of 2000, UEM had discovered that things were really beyond their control inside UEG, a company that was 51% owned by UEM, which effectively is a subsidiary of UEM. UEM also had problem in closing up UEM's accounts every year because they did not receive the audited accounts of UEG and thus UEM could not complete their own accounts. As UEM is a public listed company, the board of directors of UEM felt that those state of affairs in UEG and UEM should not be allowed to continue.

[30] The court is satisfied that UEM's intention to sell it's stakes in UEG was purely commercial. This by itself cannot amount to oppression. It is rather illogical to say that by virtue of UEM's offer to GIE to sell it's shares in UEG for RM10.71 per share as opposed to Nova Nusantara Sdn. Bhd. for RM1 per share, UEM has oppressed GIE. The offer to Nova Nusantara Sdn. Bhd., although valued at RM1 per share, came with an additional condition ie, UEM will be paid by Nova Nusantara Sdn. Bhd. upon successful listing of UEG on The Stock Exchange the sum equivalent to 50% of the net listing profit.

3rd Complaint – Attempt By UEM To Wind-up UEG

[31] GIE further alleged that when UEM could not exit at will by resiling from the terms of the shareholders' agreement, UEM inevitably revealed it's hidden intention to wind-up UEG. This, according to GIE, was clearly shown in UEM's fax dated 9 May 2000; UEM's letters

dated 4 July 2000 and 21 July 2000. All the fax and letters cited were to the effect that UEM had requested GIE to accept the terms of the proposed sale of UEM's 51% stake in UEG to GIE within stipulated time period, failing which UEM may proceed with legal action to commence the winding up proceeding against UEG. GIE claimed that those fax and letters proved disregard, oppressive and threatening behaviour on the part of UEM and their nominee directors towards GIE.

[32] The court observes that at that point of time when the last offer by UEM to sell its 51% stake in UEG to GIE (*vide* letter dated 21 July 2000) was made there was already an on-going shareholders dispute in GIE in Singapore, particularly between Seow and the 6th respondent, Soh Lup Chee, and this is crucial in order not to reflect the exact pride of GlE's shares in UEG which were subject to valuation as stipulated in the Singapore consent judgment and valuation of shares by Don Ho in Singapore.

[33] Deprived of any option and compounded with the fact that there is a deadlock in UEG by or in July 2000 (such as the adjourned meeting on 27 July 2000, and impugned meeting on 25 August 2000) this exploration of option ie, winding up of UEG, by itself and also by the surrounding facts, does not amount to oppression on GIE by UEM.

The court also observes that at that point of time, (bearing in mind that the negotiations in respect of the sale of 51% UEM stakes in UEG to GIE had been going on for 20 months) there was already a deadlock at the Board's level in UEG; by virtue of Seow having management control, UEM's nominated directors were kept in the dark or given restricted access to documents and continuous litigations between UEM and GIE, winding up of UEG would be a practical and possible option which is fair to both parties. Therefore, the alleged charge of oppression on this issue is without basis. Furthermore, it is in the ordinary course of action that when a petition under s. 181 of the Companies Act 1965 is filed, one of the reliefs prayed could be winding up and therefore, it is incredulous to hold that such relief sought for would amount to oppression.

4th Complaint – Attempt By UEM To Remove Seow As CEO Of UEG

[34] GIE further complained that the hidden agenda of UEM to wind up UEG was accompanied by another hidden agenda ie, to remove Seow as CEO of UEG. This, GIE claimed, is found in a UEG letter dated 6 October 2000 where there is a handwritten notation to say "Removal of Seow/Appt." GIE contended that from the handwritten notation and the chain of evidence, it is obvious that the issue relating

to the removal of Seow was discussed between the 4th respondent and DW3. GIE further contended that UEM thereafter made 2 attempts to remove Seow in two subsequent suits – ie, through the D1 Suit where recveiver and managers were appointed *ex parte* over UEG; and through the D3 petition where *ex parte* injunctions were obtained restraining Seow from acting as CEO of UEG.

[35] Can those actions amount to oppression?

[36] After going through all the evidence the court observes that there are valid and cogent reasons for such actions by UEM. Among the reasons are as follows:

(a) that RM1 million had been transferred without proper authority from UEG's account to GIE's account and intended to circumvent the approval for payments from UEM's nominated director. (This is supported by Seow's own admission during cross-examination);

(b) that UEM's nominated directors were not getting full access over documents of UEG and this was confirmed by Seow in his evidence at p. 23 of the notes of proceeding. One example of UEM's nominated directors not getting full access to documents is found at pp. 65-68 of the notes of proceedings wherein the issue was about UEG's cheque butts requested by UEM's nominated directors which Seow did not provide;

(c) that there were irregularities/misuse of UEG's funds by GIE or Seow personally and those were raised by UEM's nominated directors. To cite an example of how Seow has abused UEG's funds to his personal benefit or GIE is the evidence of Seow at pp. 55-58 of the notes of proceedings when he admitted a sum of RM21,427.09 from UEG's account was used for him and his family's tickets without any approval under the management procedure of UEG.

[37] Therefore, based on these evidence adduced during trial, the court is convinced that the thoughts of DW2 and DW3 of their intentions to remove Seow from UEG cannot by itself be an oppressive conduct against GIE. Rather, it is in the interest of GIE that such measure be taken by UEM in order to protect further abuse of UEG's funds by Seow. It is trite law, that the directors discretion should be exercised *bona fide* in the interest of the company, (see *Re Smith and Fawcett Ltd.* [1942] All ER 542). Here, UEM's nominated directors had acted *bona fide* to remove Seow as CEO of UEG in the interest of the company to prevent further misappropriation of funds by Seow. Such conduct would not amount to oppression as alleged by GIE.

A **5th Complaint – Non-ratification Of The Shareholders Agreement**

[38] GIE has alleged UEM, in answer to GlE's allegations of oppression by not agreeing to appoint GlE's nominated director in UEG, has cloaked itself with the issue of non-ratification of the shareholders' agreement as an answer to it's refusal to appoint Christina Rani replacing Soh Lup Chee as GlE's nominated directors in UEG. GIE cited cl. 25 of the shareholders' agreement which provides:

> The Company and its directors shall act in full compliance with the provisions of this Agreement. For the ratification of this Agreement by this Company, the parties hereto shall cause this Agreement to be adopted by resolution by the Company within 30 days from the date of its incorporation and thereafter the Company shall be deemed to be a party to this Agreement and shall be bound by the terms and conditions thereof in so far as the same apply to it.

[39] It is not disputed that the shareholders' agreement was not ratified by UEG's board of directors. No such resolution ever passed by UEG's board of directors. As a result, UEG can always claim that UEG and its board of directors are not bound by the terms of the shareholders agreement.

[40] The question to ask is: who is to be blamed for the non-ratification of the shareholders agreement by UEG or it's board of directors. GIE is saying that the blame should go to UEM or it's nominated directors. The court cannot agree with GIE on that point. The court observes that GlE's nominated director in UEG, namely Seow, was the only one director/corporate representative/CEO of UEG that was handling, managing and controlling the affairs of UEG from the start ie, 1993. Surely it would have crossed his mind that cl. 25 has not been complied with or at the very least, bring it up to the board of directors meeting for deliberation and decision to be taken. But this was not done. Was it an oversight or done with purpose?

[41] The proper step to be taken by UEG or it's board of directors, where Seow played a vital role as CEO of the company, was to get the shareholders' agreement ratified within 30 days from the date of its incorporation, either through board of directors' resolution or by incorporating it into it's Memorandum and Articles of Association. This is in line with the decision in *Beh Chun Chuan v. Paloh Medical Centre Sdn. Bhd. & Ors* [1999] 7 CLJ 1 HC where it was held:

> In order to ensure that the terms of the shareholders' agreement shall bind the shareholders inter se under the Companies Act 1965, it would be necessary to incorporate them in to the articles of association of the company.

[42] Clearly in he present case, this non-ratification of the shareholders' agreement is not the fault of UEM or its nominated directors. Therefore, it does not amount to oppression by UEM or GIE as complained by GIE.

Conclusion (D9 Suit)

[43] Even assuring that the shareholders' agreement between UEM and GIE would be the basis of oppression, UEM has given strong and concrete reasons that such conducts by UEM, in relation to the charge by GIE that UEM had oppressed GIE, are not complaints oppressive that would grant GIE the relief under s. 181 of the Companies Act 1965.

[44] Having examined the complaints advanced by GIE (as the petitioner in this D9 Suit) and heard the evidence adduced during trial as well as submissions of the respective counsels and applying the relevant principles of law as cited earlier, the court is unable to find the instances mentioned therein, that the affairs of the company (UEG) were being conducted, or that the powers of the directors were being used in a manner oppressive to GIE (the petitioner) or in disregard of the interest of GIE, that would require the remedy under s. 181 of the Companies Act 1965**.** The court therefore, is constrained to dismiss this petition (D9 Suit) with costs.

D3 Suit

[45] In this D3 Suit, the petitioner is UEM and the respondents are UEG and GIE. In this suit UEM complained that the affairs of UEG (managed and controlled by Seow) are being conducted in a manner oppressive to UEM or in disregard of the interest of UEM as shareholder, contrary to s. 181 of the Companies Act 1965.

1st Complaint: Misappropriation Of UEG's Funds And Criminal Breach Of Trust Allegedly Committed By Seow

(i) The Hanoi Sheraton project – the misappropriation of US$13,859,484.10 (RM52,666,040)

On 24 May 1997, UEG entered into a sub-contract with Gammon-Road Builder Joint-venture to undertake the Mechanical and Electrical Installation Services for the Hanoi Sheraton Project, at a sum of US$16,800,000.00 (RM63,840,000). On 20 August 1997 the sub-contract was novated and UEG entered into a novation agreement with Gommon – CCI Construction Ltd.

Despite the fact that the sub-contract was awarded to UEG, payments made under the sub-contract as well as the novation agreement were not received by UEG, but were diverted directly to GIE in Singapore on instructions given by Seow, as per letter dated 22 November 2000 on UEG's letterhead signed by Seow. Under cross-examination Seow admitted this fact (refer to p. 107 of the notes of proceedings). Under cross-examination Seow also admitted:

(a) there was no written resolution passed by the board of directors of UEG in respect of the said payments made directly to GIE;

(b) there was no disclosure minuted in the UEG's board of directors meeting to the fact that the payments were to be made directly to GIE in Singapore;

(c) GIE made a profit of S$8,786,605 from the Hanoi Sheraton Project, which was never disclosed to the board of directors of UEG;

(d) he (Seow) did not informed the auditors of UEG, Messrs. Ernst & Young, that the payment due to UEG for the Hanoi Sheraton Project had been paid directly to GIE in Singapore despite the fact that the auditors had specifically sought clarification, on the Hanoi Sheraton Project.

[46] It is clear from the above that the board of directors of UEG were at all material times unaware that the US$13,859,484.10, which was due to UEG in respect of the Hanoi Sheraton Project, had been surreptitiously diverted by Seow to his own company in Singapore GIE. (Seow, as the CEO and director of UEG is also the managing director and virtually the owner of GIE). UEG, to date, has received nothing whatsoever from this project.

(ii) Misappropriation of RM1 million and criminal breach of trust.

There are evidence to show that Seow had transferred RM1 million in an unauthorized and unlawful manner from UEG's account at Mayban Finance Bhd to GlE's bank account at Maybank Bhd, Jalan Klang Lama branch. The said transfer was made by one Azni Amran (of UEG) on instruction of Seow. Seow in his evidence in court admitted the followings:

(a) that the RM1 million was transferred from UEG's account to GlE's account; (see: pp. 23-24 of the notes of proceedings);

(b) it did not cross his mind whether the transfer was right or wrong; (see: p. 60 of the notes of proceedings);

(c) he never inform the other directors of UEG about the transfer of the money; (see p. 61 of the notes of proceedings);

(d) there was no authorization given by UEG to transfer the money to GIE; (see: p. 67 of the notes of proceedings);

(e) that the RM1 million has not been re-transferred back to UEG; (see: p. 67 of the notes of proceedings);

(f) that the RM1 million which was transferred to GlE's account has all been spent; (see: p. 76 of the notes of proceedings);

(g) that he (Seow) could operate GlE's bank account on his own ie, signing singly (see: p. 80 of the notes of proceedings).

[47] From the evidence, there is a clear indication that the RM1 million was misappropriated by Seow and GIE. Even if one was to accept Seow's assertion that the RM1 million was not transferred to GIE upon his instructions, the fact remains that he did not return the money to UEG, but spent it without the knowledge or consent of the board of directors of UEG. Bearing in mind that Seow was the only single signatory to the related GlE's account where the RM1 million was transferred into.

[48] Even if GIE had decided that it was holding the RM1 million on trust of UEG (as alleged by Seow in his evidence in court) then it would have been a clear case of criminal breach of trust by Seow when GIE went ahead and spent all the money without the knowledge and consent of the board of directors of UEG. The RM1 million does not belong to GIE or Seow and therefore GIE or Seow has no right in law to spend or utilize the money.

(iii) Issuance of cheque in favour of Elton Sun Kim Choy

The issuance of cheque dated 5 April 2000 in favour of Elton Sun Kim Choy (an ex-employee of UEG) for an amount of RM50,000.00 on instruction of Seow, is another instance of how funds of UEG were misappropriated or misused by those having control of UEG. The evidence shows that the cheque though issued, was never given to Elton Sun Kim Choy. The cheque was cashed but the RM50,000.00 was never paid to Elton Sun. The records of UEG show that the payment was being made by UEG for Job no: 6030 being the Kitchen sub-contract for the Subang Sheraton Project. Seow agreed that he received an enquiry from Cik Sulaihah Maimunni (a director nominated by UEM in UEG) in relation to the payment but he did not reply to the enquiry. Seow admitted in his evidence that he did not get, the approval of the board of

directors to issue the cheque for RM50,000 in favour of Elton Sun and never informed then of the matters relating to the cheque. Seow also admitted that, of the RM50,000 he had intended to use RM30,000 to pay Elton Sun for his services to GIE on the Yangon Sedona Project. The project was a GIE project, and not UEG project. However, nothing in the payment voucher stated that RM30,000 (out of the RM50,000) was being paid on behalf of GIE. Seow claimed that the RM50,000 was kept in the safe in cash for two years. It was not redeposited into UEG's bank account. It was also not reflected in the draft management accounts and that UEG's accountant was unaware that the RM50,000 was kept in the safe.

In the course of his evidence, Seow admitted that although he signed a cheque for RM50,000 in favour of Elton Sun and the payment voucher for Job no: 6030 (for kitchen sub-contract) on 5 April 2000, he had already signed the statement of final account for the kitchen sub-contract on 4 April 2000 (the day before). Seow also agreed that there was no longer any need to prepare loss and expenses claim for the kitchen sub-contract works as UEG had already accepted the statement of final account. Yet, Seow proceeded to sign and issue the RM50,000 cheque the next day (5 April 2000) in respect of the same job, when he knew that there was absolutely no need to do so because on the previous day, 4 April 2000, he had already signed the statement of final account relating to the same Job no: 6030.

(iv) Oppressive Conduct in respect of the 1st Complaint

A company and its members have a right to ensure the integrity of its assets and that its funds are not misappropriated or diverted.

In summary, both the moneys diverted from the Hanoi Sheraton Project and the RM1 million from UEG's fund demonstrate that the interests of the shareholders of UEG are at risks because UEG has been in effect siphoned of its money. It is revealing to note that Seow admitted brazenly to the court that whilst recognizing that there were weaknesses in the financial management of UEG, he, as the then CEO of UEG, took no steps to ensure that such a misappropriation of funds would not happen again. In fact he was the one involved in the act of misappropriating UEG's funds. The court is satisfied that the misappropriation of funds as outlined above was a result of the affairs of UEG being conducted in an oppressive manner and with disregard to the interest of UEM as a shareholder of UEG and therefore contrary to s. 181 of the Companies Act 1965.

2nd Complaint: Breach Of No-profit Rule and Fiduciary Duty By Ms Christana Rani

[49] Christina Rani was another director in UEG nominated by GIE. She was also an advocate and solicitor working for Messrs. Sahadin and Associates. Seow instructed Christina Rani to do some legal works for UEG before and after she was appointed a director of UEG.

The evidence shows that although payments were made to her by UEG, such payments were never authorized or approved by the board of directors of UEG, and ratified by the shareholders in a general meeting.

[50] It is trite law that a director of a company is a fiduciary and in order for a director to receive payment, such payment must be disclosed to and authorised by the board of directors. Where secret profits are made and where fiduciary obligations are breached, then this may result in the assets of the company being at risk. Members or shareholders of a company have a right to ensure that the directors of the company act in accordance with their fiduciary obligations and not to make secret profits from the company. In the present case, there was breach of no-profit rule and fiduciary duty by Christina Rani when she received the payments without any authorization or approval of the board of directors of UEG either generally or specifically. Such act may amount to an oppressive conduct done in total disregard of the interest of the company (EUG) as well as the shareholders. It demonstrates that the affairs of UEG are being conducted in a manner contrary to s. 181 of the Companies Act 1965.

3rd Complaint: Secret Profits And A Breach Of s. 131 Of The Companies Act 1965

[51] Seow was the owner of 65% of the issued shares of Metronics Engineering Sdn. Bhd. Seow admitted that his shares in Metronics was registered in the name of a nominee, Mr. Goh Joon Hai. Seow claimed that he owned his shares in Metronics from 1987 to the end of 1996. Evidence shows that UEG had awarded contracts relating to Duty Free Zone Shopping Complex; National Sport Complex – Outdoor Stadium; and Sheraton Towers Kuala Lumpur worth around RM7 million to Metronics. Seow personally admitted this in cross-examination (see: p. 57 of the notes of proceedings).

In his examination-in-chief, Seow testified that those contracts awarded to Metronics would be construed as "exempted contract" under cl. 1.2 of the shareholders' agreement. Clause 1.2 provides:

Exempted Business

The existing trades and business of mechanical and electrical engineering works and the related activities currently undertaken by (JEM in Malaysia in Power Genertion, Power Transmission and Water Treatment and Sewerage Treatment above 50,000 gallons per day capacity and the building automation system and security systems activities currently under taken by GlE's shareholders in Malaysia.

[52] Reading cl. 1.2 closely, the court is satisfied that those contracts awarded by UEG to Metronics do not come under the ambit of "exempted contract" under the provisions. On true construction of cl. 1.2 of the shareholders' agreement, the exemption therein relates to Building Automation System and Security System activities currently undertaken by GIE shareholders in Malaysia. Seow conceded that Metronics was not a GlE's shareholder. Therefore, there is no question of applying the exemptions under cl. 1.2 of the shareholders' agreement to transactions with Metronics.

[53] That being the case, the said transactions are caught under s. 131 of the Companies Act 1965 (particularly subsections (1), (6) and (7).), which provides, *inter alia*:

(1) Subject to this s. every director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall as soon as practicable after the relevant facts have come to his knowledge declare the nature of his interest at a meeting of the directors of the company.

(6) The Declaration shall be made at the first meeting of the directors held:

(a) after be becomes a director; or

(b) (if already a director) after he commenced to hold the office or to possess the property;

as the case requires.

(7) The secretary of the company shall record every declaration under this section in the minutes of the meeting at which it was made

[54] The minutes of all the UEG board of directors meeting have been tendered in evidence throughout the proceedings. A careful perusal of the said minutes reveals that they do not record any declarations ever having been made by Seow to inform the board of directors that he was the beneficial owner of the shares in Metronics, a company which at the material time, was being awarded contracts by UEG. Indeed, Seow

admitted under cross-examination that at the time when the contracts use awarded to Metronics, he made no declarations of his interest in Metronics, to the board of directors of UEG (see: p. 74 of the notes of proceedings). Seow also admitted that he was involved in approving the award of the contracts by UEG to Metronics (see: p. 61 of the notes of proceedings). Clearly, there is a beach of s. 131 of the Companies Act 1965 committed by Seow. This is an instance in which Seow acted in a criminal manner by breaching s. 131 of the Companies Act 1965, hoodwinking the board of directors of UEG as to his interests in Metronics and enriching himself by awarding contracts to a company in which he was the 62% shareholder. There was no expression of remose or guilt in the face of a brazen contravention of the law. Not only has UEM been oppressed by these illegalities but corporate governance will be at low ebb if such wanton disregard for the law is allowed to go unfinished. This obviously amounts to clear disregard of the interest of the company, its board of directors as well as the shareholders.

4th Complaint: Irregular Payments Made Allegedly On Behalf Of GIE

[55] UEM's contention here is that Seow and GIE led management of UEG abused their position and used the funds of UEG to make payment on behalf of GIE. UEM alleged that Seow and GIE led management of UEG effectively used a system of alleged "inter-company" payments to defraud and siphon money out of UEG for their own benefit, without any board's resolution. In short, UEM claimed that the "inter-company payment arrangement" is a device which was created by Seow and used by him for his own benefit.

In his testimony in court, Seow admitted that the following payments on behalf of GIE were made by UEG:

(a) legal fees to Messrs. Zaid Ibrahim & Co. for services rendered GIE;

(b) legal fees to Christina Rani for services which she rendered to GIE;

(c) moneys expended on Messrs. Don Ho & Associates, valuers appointed in respect of a dispute which Seow had with his partners in GIE.

[56] Seow was shown a document (at p. 113 of encl. 50B) which he agreed was a UEG document reflecting "inter-company" transactions with GIE as at 31 December 2000 which shows that there was an amount due from GIE to UEG in the sum of RM515,217.56. Seow also agreed that the "inter-company" listing in encl. 39, showed a net

amount due from UEG to GIE in the sum of RM44,360.53. In relation to this, Seow admitted that in his meetings with UEG's auditors, Messrs Ernst & Young he did not draw their attention to the existence of the "inter-company" accounts. Seow also made a significant admission on his testimony (see: Notes of proceedings at p. 50 dated 17 March 2001) when he confirmed that he did not table the "inter-company" accounts before the board of directors of UEG for their approval.

[57] It should be noted that Seow's most significant and damaging admission is that he was unable to confirm whether GIE had repaid UEG for the moneys which UEG has expended in respect of GlE's matters. Similarly, Seow was unable to confirm whether GIE had repaid UEG for the items pleaded in this petition (D3 Suit). The brazenly and arrogant attitude of Seow is exemplified by his response that there was no need to make any attempt to verify whether UEG was reimbursed for the moneys it was expending on behalf of GIE (see: p. 86 - notes of proceedings dated 17 June 2004). Seow agreed that he received several written objections from directors of UEG nominated by UEM to this "inter-company" arrangement, but despite these objections he continued with it (see: pp. 88-90 of notes of proceedings dated 17 June 2004).

[58] From the evidence, the court is of the view that the "inter-company" payment system instituted by Seow was designed to circumvent the system of joint approval of payments which was in place in UEG. Under the system in UEG, payments above a specified amount could only be made with signatures from both signatories nominated by UEM and GIE. However, under the "inter-company" device, a purchase could be affected by GIE upon receipt of a requisition from UEG, which need not be signed by the directors of UEG nominated by UEM.

[59] The abuse of power committed by Seow was not limited to payments on behalf of GIE but also extended to a rampant use of UEG's staff for GlE's projects. Seow confirmed that he had used the following UEG's employees for GlE's projects:

(i) Sheikh Junaidy bin Jamaluddin, a project executive in UEG, was asked by Seow to assist in a GlE's project being the Singapore Police Headquarters project and UEG continued to pay his salary during this period. Seow admitted that he does not know for a fact whether UEG was ever reimbursed for Sheikh Junaidy's salary;

(ii) Chew Kam Foo, was also UEG's employee who Seow had use for GlE's projects and that UEG paid for his salary.

(iii) Kong Kuan Yin - also another UEG's employee used to do works for GlE's project, whose salary was paid by UEG.

[60] Seow admitted that the did not get the approval of the board of directors of UEG for the use of it's employees for GlE's projects. It is also clear that due to the lapse of time many of the alleged "inter-company" matters will never be accounted for as there is no one to do it. Seow said in his evidence that the accountant would clear all the "inter-company" transactions. However, when pressed, Seow admitted that UEG has no accountant and has not had an accountant for the past three years. It is therefore clear that there has been no reconciliation of any "inter-company" accounts for the past three years, if not more.

[61] The court is also of the view that the "inter-company" device instituted by Seow and GIE was oppressive on UEM because it was a mean used to siphon money out of UEG without the knowledge and approval of the Board of Directors. It also means that UEM, as a shareholder of UEG, lost its ability to ensure that it's nominees the co-signatories of payments in respect of items allegedly purchased by GIE. Additionally, there was no means of knowing whether the items allegedly purchase by GIE on behalf of UEG were actually intended for UEG's proposes or were used by GIE for it's own projects. The following authorities support the proposition that such a conduct by Seow amounts to "oppression".

[62] In *Re Steaward (Bixton) Ltd.* [1985] BCLC 4**,** a director of a Company A formed a new company (Newco). The director arranged for Company A to supply Newco with materials and labour for which payment had not been made. The English High Court held that the conduct complained off was oppressive to the petitioner.

The case *Re Elgindata Ltd.* [1991] BCLC 959 is also an authority for the proposition that the use by a director of the resources of the company for another company which he has interest in is oppressive.

The aggravating factors which fortify the case for oppression in the present case are:

(i) the "inter-company" device which was used by Seow was never approved by the board of directors or by the shareholders but a device which Seow created to benefit himself and GIE;

(ii) that Seow continued with the "inter-company" device despite receiving protests from the directors of UEG nominated by UEM. This clearly shows the contempt and disregard that Seow had for UEM and it's nominated directors of UEG; and

(iii) there is no proper reconciliation or recording of the "inter-company" accounts. Seow in his evidence testified that there has been no accountant in UEG for the three years reconciling the accounts or recording the "inter-company" transactions.

In the circumstances, UEM's interest as a shareholder/member of UEG are clearly oppressed as the assets of UEG have been applied for GlE's purposes. The absence of any proper recording of the "inter-company" transactions given rise to a high probability that payments made by UEG will never be reimbursed by GIE. There is a clear duminution in the value of UEG as a result of Seow's acts.

5th Complaint: The Management Of UEG's Financial Affairs In A Manner Wholly Lacking Probity

[63] UEM's complaint under this ground is that Seow and the GIE led management of UEG conducted the financial affairs of UEG with a high level of dishonesty and with clear intentions to defraud UEM.

[64] There are evidence to show that no audited accounts for UEG since the financial year ending 31 December 1998. Seow, who was the managing director and CEO of UEG at the material times, admitted in his testimony that he is the director of UEG who was most familiar with it's financial affairs (see: notes of proceeding dated 17 March 2000 at p. 122). He also admitted that it was his duty to ensure the accounts were completed on time (see: Notes of proceedings dated 24 June 2002 at p. 10). It is oppressive to deny to UEM, as member of UEG to have the accounts of UEG audited for the past 6-7 years since 1998. Mr. Tan Soo Yan, UEG's auditor from Messrs. Ernst & Young in his evidence confirmed that it was not possible to know what is the current financial position of UEG (see: Notes of proceedings dated 9 March 2001 at p. 49).

The absence of a finalised audited account by an independent external auditor deprives UEM of an explaination as to how UEG sustained an unprecedented loss of RM43.28 million in the space of just 12 months from 31 December 1998 to 31 December 1999.

UEM also contended that the directors of UEG nominated by it have been consistently denied access to the records and documents of UEG and have thereby been prevented from properly carrying out their duties as directors of UEG. Additionally, UEM, as a public listed company, was required to prepare consolidated accounts including the accounts of UEG, its subsidiary, but has been unable to do so as UEG has been unable to audit it's accounts.

[65] These complaints by UEM are not without basis. There are evidence to show that on 17 July 2000 the Directors of UEG nominated by UEM through their agents did attempt to conduct an audit of UEG but were denied access to the office of UEG by Seow or by Azni

Amran on Seow's instructions. Same attempt was made again on 20 July 2000 by the directors nominated by UEM or their agents, but were again denied access to the offices of UEG on Seow's instruction.

Seow admitted that under cl. 11.2 of the shareholders' agreement, the directors of UEG had full access to the books, accounts and other records of the company but despite this provision he still denied access to the directors of UEG nominated by UEM. On 31 July 2000, another attempt was made by the directors of UEG nominated by UEM through their agents to gain access but they were again refused entry to UEG's offices. On 4 August 2000 the directors of UEG nominated by UEM attended UEG's offices. This time, Seow admitted he restricted the persons who could accompany the directors to one assistant.

[66] There are also evidence to show that the directors nominated by UEM had returned to the office of UEG on 7 August 2000, 8 August 2000, 9 August 200 and 10 August 2000 but they were still not given the documents they requested.

Inter alia, the following documents were never provided by Seow:

(i) cheque butts of cheque books from UEG's accounts;

(ii) all tender and award of contracts;

(iii) specimen signature of employees without category E4 and above;

(iv) list of works omitted for the Telekom Projects;

(v) variation order;

(vi) details of break down of deductions for main contract; and

(vii) the management accounts of UEG for 31 December 1999

[67] The manner in which Seow treated the Directors of UEG must be contrasted with the manner in which he treated Mr. Don Ho, the valuer appointed by the Singapore High Court in respect of the dispute which Seow had with his former partners in GIE. Mr. Don Ho is a stranger to UEG and yet Seow admitted in his testimony that he gave him full access to UEG's documents.

In summary, Seow agreed that numerous requests had been made for UEG's management accounts for the year ending 31 December 1999 and that he did not reply those requests or ever provide the said accounts.

[68] The court is of the view that the conduct of Seow in managing UEG was oppressive in the extreme. The directors of UEG nominated by UEM were treated with contempt and prevented from properly carrying out their duties as directors of UEG.

[69] Seow also throughout the proceedings contended that he managed UEG in accordance with the Discretionary Authority Limits (DAL), which was implemented by a board of directors resolution dated 6 March 1998. There are evidence to show several breaches of the DAL committed by Seow, namely:

(i) Clause 3.4 of the DAL requires Seow's claims to be approved by the management committee. Seow admitted that the management committee did not approve his claims;

(ii) Seow admitted that the DAL did not allow him to give out loan. However, evidence shows that Seow gave a loan to Mr. Venu Gopal on behalf of UEG for the equivalent of RM400,000, without approval of the board of directors of UEG:

(iii) Seow accepted two condominiums in Shah Alam as an alleged settlement of debts due to UEG, without even informing the board of directors of UEG and without any valuation done to ascertain their value.

[70] It is clear that Seow acted in total disregard of the Board of Directors of UEG, did not abide by the DAL and treated UEG or it's assets as if they were his own personal property.

[71] UEM has proven that Seow and the GIE led management who have admitted being in continuous control of UEG have failed to ensure that the company file its audited account for over six years.

Additionally, the directors of UEG nominated by UEM were denied access to the accounts, books, records and other documents of UEG. In *Lords and Another v. John Blackwood Limited* [1924] AC 783, the Privy Council stated, *inter alia*, in respect of a failure to submit accounts as follows:

> The directors in control since the death of Blackwood Rodger have, I think, laid themselves open to the suspicion that by omitting to hold general meetings, submit accounts and recommend a dividend, their object was to keep the petitioners in ignorance of the truth and acquire their shares at an under value.

[72] In *Re a Company* [1990] BCLC 384, Herman on the same issue held that:

> This present case is of repeated failure, year over year over year, to hold annual general meetings or to lay accounts before members, so that members were wholly deprived of any opportunity to consider the affairs of the company, to vote on the election or re-election of directors, or in any other way to know what was going on. As its seems to me, that conduct, not the absence of filing but the conduct in depriving members of their right to know and consider the state of the company and its directorships, and to ask questions of its directors, is conduct which inevitably, must be prejudicial to the interest of members.

In *Tan Kian Hua v. Colours Image Scan Sdn. Bhd.* [2004] 6 CLJ 174 HC, the High Court accepted the denial of access to the office and the no-provision of accounts as forming part of the oppressive conduct which justified the winding up of a company.

In the present case, UEM's rights have been gravely oppressed as it has virtually no idea as to the true financial position of UEG or as to how it's records and documents are kept and the extent to which it's assets have been deleted.

Further, the denial of access to the office and the documents of UEG to the directors of UEG nominated by UEM is also gravely oppressive. This is contrary to the legitimate expectations of UEM, as evidenced in the shareholders' agreement that it would be allowed to participate in the management of UEG. Furthermore, it is contrary to the intentions of both parties as stipulated in cl. 11.3 of the shareholders' agreement as follows:

> 11. Proper books of account and other records shall be kept regarding all transactions entered into by the Company, or its Directors, and shall be freely accessible to the Directors at all reasonable times.

6th Complaint: Lack Of Diligence And Probity In The Management Of UEG

[73] UEM contended that it was oppressed and/or it's rights as a Shareholder were disregarded because, the Shareholders of UEG had the right to nominate the signatories to UEG's bank accounts. The purpose for nominating signatories was that for cheque payments and bank account operation, a signature of a nominee of each joint venture partners ie, UEM and GIE, would be required. This mechanism operated as a means of check and balance or control that each shareholder had over the nominees of UEG.

[74] One Azni Amran was an employee of UEM but was transferred to UEG. However, on 5 April 1999, Azni Amran was hired by Seow as the Finance Manager of UEG. UEM than sought to transfer Azni Amran from UEG but was prevented from doing so by Seow.

[75] Seow than proceeded to engage Azni Amran directly as the finance manager of UEG in 1999. Seow agreed that after Azni Amran was absorbed into UEG as an employee, UEM had no control over him. In fact Seow admitted in his testimony that from the date Azni Amran was offered the job, he became an employee of UEG and became his (Seow's) subordinate. When UEM discovered that Azni Amran was engaged directly by UEG as its employee, UEM decided that it was inappropriate for Azni Amran to be one of it's nominated signatories because Azni Amran was now an employee of UEG under the direct management and control of Seow.

UEM wanted to remove Azni Amran as a cheque signatory. This was objected by Seow. In his testimony, Seow agreed that he wanted to retain Azni Amran as a signatory. The evidence shows that the role that Azni Amran played, in Seow's grand scheme to depraud UEM was on extremely important one. All cheques were signed by Azni Amran and Seow. Azni Amran being the in-house accountant was privy to all the wrongdoings of Seow as follows:

(i) the misuse of UEG funds to make payments on behalf of GIE;

(ii) the misuse of UEG's employees for GlE's project and non-recording of the same in GlE's accounts;

(iii) the diversion of US$13.8 million to GIE in respect of the Hanoi Sheraton Project;

(iv) the transfer of RM1 million from UEG to GIE; and

(v) the cheque of RM50,000 issued in favour of Elton Sun.

[76] Azni Amran had committed CBT in respect of UEG's RM375,000. Azni Amran confessed to the commission of such wrongdoing. It is telling that Seow admitted that he took no disciplinary or legal action against Azni Amran on the issue. Seow's reluctance to take actions against Azni Amran probable stems from the fact that Azni Amran is privy to all of Seow's wrongdoings in UEG and if Azni Amran is cornered, then he may reveal all his secrets. In order for Seow to perpetrate his wrongdoings it was essential for him to win Azni Amran over, and, this is clearly what he did. A significant point to note is that Seow has admitted that after Azni Amran had committed CBT over UEG's moneys, to get Azni Amran to sign 24 out of 35 cheques which the Directors of UEG nominated by UEM had refused to sign.

This is despite the fact that Seow recognized that the Directors of UEG nominated by UEM were not satisfied with the explaination which he gave. The words of Seow sum up the matter as follows:

> Inspite of being a CBT crime, and ceasing to be employee of UEG, I agree got him to sign cheques. Technically, up till today, he is a cheque signatory.
>
> I agree when Zaki and Sulaihah Maimunni refused to sign cheques, I threatened to get Azni Amran to sign even though he had (ceased) to be in UEG's employment.
>
> (see: Notes of proceedings dated 26 February 2002 at p. 27).

[77] These evidence clearly show that Seow's conduct in the matter was in total disregard of UEM's interest in UEG and gravely oppressive.

7th Complaint: Management Of UEG With Total Disregard Of The Board Of Directors

[78] UEM submitted that Seow and GIE led management of UEG acted in an oppressive manner in that they managed UEG with total disregard of the board of directors. From the evidence adduced during the proceedings the court finds that Seow and GIE led management of UEG intentionally sidelined the board of directors in many instances. Among them are:

(i) Christina Rani, the other GIE nominated director of UEG, issued a letter dated 6 June 2001 offering Seow employment as the CEO of UEG when Seow's (a Singaporean) employment pass to work expired on 17 June 2001. This was done without the knowledge or approval of the board of directors of UEG;

(ii) the transfer of RM1 million from UEG to GIE was done without the knowledge or approval of the board of directors;

(iii) the diversions of US$13.8 million to GIE in Singapore was similarly done without the knowledge or approval of the board o directors;

(iv) the issuance of a cheque in the name of Elton Sun and it's encashment was never raised before the board of directors;

(v) the acceptance by Seow of the two condominiums in Shah Alam was never approved by or notified to the board of directors;

(vi) the access of records and documents to Mr. Don Ho was never put before the board of directors;

(vii) the appointment of Azni Amran as a financial manager of UEG was also never referred to the board of directors.

[79] The above instances clearly support UEM's complaints that the management of UEG by Seow and the GIE led management was done with total disregard of the board of directors. UEM as a major shareholder of UEG is entitled to expect that the board of directors of UEG shall perform it's functions as a board and that the proceedings of the directors shall be carried out in a normal manner for the interest of the company. In this context the court is in full agreement with Toner LJ in the case of *Re H.R. Hermer Ltd.* [1958] All ER 689 where it was held:

> As to this however, I accept the submission of counsel for the Petitioners that Shareholders are entitled to have the affairs of a company conducted in the way laid down by the company's constitution. Members are entitled to expect that their board shall perform its functions as a board and that the proceedings of the directors shall be carried out in a normal and orthodox manner. They are entitled to the benefit of collective experience of the directors, and to expect that the directors and each of them can freely express their views at board meetings and that regard shall be had to resolution properly passed.
>
> If the board is browbeaten and either ignored or overruled by one of its number, in this case the father who was the Chairman, in reliance on his superior voting power, the proprietary interests of the minority Shareholders cannot fail to be affected and a case of oppression within s 210 is, in my judgment, made out.

[80] In the present case, art. 73 of the Articles of Association of UEG clearly provides that:

> 73. The business of the company shall be managed by the Directors …

[81] This requirement in the Articles of Association of UEG has clearly been disregarded by Seow and Christina Rani (both were directors nominated by GIE).

[82] By acting unilaterally, they had usurped the function of the board of directors. This is another clear case of oppression as UEM as a shareholder of UEG was deprived of the collective views and governance of the company on the board of directors.

8th Complaint: Obstruction Of UEM From Appointing Its Nominated Director In UEG

[83] UEM's case is that it has been prevented from appointing Encik Suhaimi Halim to replace Encik Mohd Zaki Hamdan as a director of UEG and from appointing Ms. Wong Lee Loo to act as an alternate director to Cik Sulaihah Maimunni.

[84] Clause 7.1 of the shareholders' agreement recognized the right for each shareholder of UEG, since it's inception, to appoint 2 directors each. This is a right of each shareholder quo shareholder of UEG.

Clause 7.1 provides:

> 7.1. The number of Directors in the Company shall be four, made up of two (2) nominees from UEM and two (2) from GIE. The parties shall endeavour to nominate such representatives as directors from persons who are conversant and have relevant experience in finance and technical expertise relevant to the proper execution of the 'Agreed Business'.

[85] This provision reflects the legitimate expectations of the parties and is relevant insofar as petition under s. 181 of the Companies Act 1965 is concerned.

[86] Therefore, the legitimate expectation of UEM as a shareholder of UEG that it would be able to nominate and appoint directors and alternates of it's choice has been transgressed and that a grave oppression has occurred.

9th Complaint: Incitement Of Staff Against The Directors Of UEG Nominated By UEM

[87] UEM contended that Seow has been inciting the staff of UEG against the directors of UEG nominated by UEM.

[88] The evidence shows that Seow organized a dinner for the staff of UEG wherein he made numerous false and unwarranted allegations and remarks against the directors of UEG nominated by UEM. Even in his evidence Seow admitted that he made comments against Cik Sulaihah Maimunni including allegations that she failed to uphold and discharge her duties and perform her obligations as a director of UEG (see: Notes of proceedings dated 22 March 2004 at p. 89).

[89] In a way the court is of the view that such conduct by Seow amounts to oppression because Seow had in fact caused the staff to be incited against the Directors nominated buy UEM in a manner which resulted UEG becoming unmanageable.

A **Credibility Of Seow's Evidence**

[90] Seow was the only witness who testified in court on behalf of GIE. The affidavits affirmed by Christina Rani were withdrawn and she was never offered as a witness. The court is of the view that an
B adverse infence should be drawn pursuant to s. 114(g) of the Evidence Act 1950 as a result of the withdrawal of her affidavit evidence and failure to produce her as a witness. It must be remembered that the charges relating to secret profits and acting in disregard to the board of directors were acts which directly concerned Christina Rani. It would be
C essential for her to testify in court or at least swear affidavit evidence to justify her position.

[91] Seow's evidence in court throughout the proceedings should be treated with great caution. He was not a straight-forward witness. He has evaded answers in cross-examination when he considered true
D answers would be damaging to his case. His demeanour during cross-examination instill doubt on the truthfullness of his statements. His countless effort in evading questions put forth by UEM's counsels and the reluctance in his answer is in stark contrast to his solid and meticulous answers when questioned by GlE's solicitors. The court
E finds that the weight attached to his statements would be considerably low taking into account his bad demeanour.

Seow was evasive in his answers during cross-examination. He contradicted himself numerous times that, his credibility as a witness has been totally diminished (see: Seow's evidence on 15 March 2004 at
F pp. 27 to 29 of the notes of proceedings). Other examples of his inconsistencies in his evidence are related below.

[92] In giving evidence before this Court, Seow disagreed that he was the director of UEG who had primary responsibility for the financial affairs of UEG (see notes of proceedings dated 17 March 2004 at page
G 30). However, he had priviously sworn a statutory declaration on 15 March 1998 (encl. 11 at p. 197) that he was the director of UEG who was primarily responsible for the financial management of UEG.

[93] In another occasion, Seow testified in court that he instructed
H Messrs. Gideon Tan Razali Zaini to act for UEG in respect of the D3 petition in his capacity as a director of UEG together with Christina Rani and not under the DAL (see: Notes of proceedings dated 23 July 2002 at p. 18). However, Seow had also affirmed in the proceedings affidavit no: 10, encl. 56. where he stated under oath that he had
I appointed Messrs. Gideon Tan Razali Zaini in his capacity as Chief Executive Officer of UEG and relying on the DAL. When this contradiction was pointed out to him, he testified:

> I agree the version I gave in Court is true ... I agree I contradicted myself in my affidavit ... when I said that I appointed Gideon Tan in my capacity as Chief Executive Officer and relying on the DAL ...

[94] Obviously, Seow was lying and had forgotten what he had affirmed in his affidavit previously.

[95] Another instance of inconsistency, is about the condominiums which Seow unilaterally accepted as a settlement of a debt due to UEG. In his evidence recorded on 24 July 2002 (at p. 22) Seow initially stated that:

> I cannot recall why I accepted this payment in kind.

[96] However, minutes later, he explained the reason to accept the payment in kind as follows:

> At the material times, Sungei Way Construction was renowned to be in dire financial straits and had not paid the amount owing to UEG for a long time. I would be failing my duty as Chief Executive Officer not to accept payment in kind. (see Notes of Proceedings dated 24 July 2002 at p 25).

[97] Another example of Seow's untruthfulness is when he confirmed that as a matter of fact that at the end of each financial year there was contra process whereby the "inter-company" accounts would be resolved (see: Notes of proceedings dated 17 March 2004 at p. 66). However, subsequently Seow admitted that he did not know for a fact that there was contra-process at the end of each year (see: Notes of proceedings dated 17 March 2004 at p. 68). This was extremely significant because Seow was seeking to persuade this court that the "inter-company" account was reconciled annually but the truth of it was that it had not been reconciled since 1995 as there were items in exh. P25 which were unreconciled since then.

[98] On these issues of demeanor and inconsistency, the court relies on *Sarkar's Law of Evidence*, 15th edn, vol 1, Wadha and Company Nagpur 1999:

> The demeanor and bearing of a witness should be very closely observed. Unless the witness is a skilled actor, his demeanour frequently furnishes a clue to the weight of his testimony. It is because the trial judge had the advantage of seeing the witness that it has been repeatedly held that his decision on a question of fact should not be lightly disturbed... When the question of credibility depends on the demeanour in the box, the manner in which the witness answer and by how he seems to be affected by the question put and so on, the trial judge has an advantage.

[99] In the present case, the demeanaour of Seow when he gave evidence was to say the least, at its lowest ebb. There were pauses, cynical smiles, confusion and inconsistencies, all added into one. The credibility of Seow as the only witness for GIE is badly and adversely affected, on the balance of probabilities. Seow's evidence is bristled with inconsistencies and half truth.

[100] Breach Of Conditions Imposed By The Foreign Investment Committee (FIC)

Clause 2.7 of the shareholders' agreement between GIE and UEM provides:

> GIE acknowledges that it will require the approval of the Foreign Investment Committee, Malaysia (the "FIC") to acquire its shareholding in the company and undertakes, upon the execution of this Agreement, to make an application for such approval, in the event GIE fails to obtain such approval the parties will negotiate further with a view to enabling the parties to co-operate in any other manner which would best fulfill the intentions of this Agreement. In the event such negotiations fail, this Agreement shall be terminated and the Company liquidated. All costs and expense of the incorporation and liquidations of the Company and any cost and expense of operation of the Company prior to its liquidation shall be borne by the equal proportions.

[101] At the inception of UEG, GIE was allowed by FIC to hold 49% stake in UEG, with a condition that GIE was required to sell down it's shareholdings in UEG from 49% to 30%. From exh. R10, it is clear that the FIC requires GIE to do so before 30 June 2000.

[102] In his evidence, Seow confirmed that GIE has not applied for an extension of time to be granted by the FIC to comply with the reduction in the shareholding; and GIE has not complied with the conditions stipulated by the FIC.

[103] The court is of the view that the FIC Guidelines (known as "Guidelines for the Regulation of Acquisition of Asset, Merges and Take-Overs") are more than mere political policy, reflecting as they do a national policy, the New Economic Policy of which the court could properly take judicial notice. Non-compliance with the requirements of the guidelines can obviously have adverse consequences. The Federal Court in *David Hoy v. New Kok Ann Realty Sdn. Bhd.* [1984] 1 LNS 51 has taken the view that non-compliance with the FIC Guidelines is a matter which the courts can take judicial notice of. In any event, given that the FIC has stipulated that GIE should reduce it's shareholding in UEG from 49% to 30% (before 30 June 2000), then on no condition should an order be made that, UEM is required to sell it's 51% stakes

in UEG to GIE (as prayed by GIE in it's D9 Suit) because this would go totally against the conditions imposed by FIC as well as against our public policy.

Summary And Conclusion (D3 Suit)

[104] On the basis of the evidence adduced by way of affidavits and elicited by cross-examination of the witness, the factual assertions, as pleaded by UEM in this petition (D3 Suit) have been proven on the balance of probabilities. The trust of UEM's case for oppression has been the financial wrongdoings and misappropriation of moneys by Seow and GIE led management of UEG. A member of a company has a right to ensure the integrity of the assets of the company. Oppression occurs where the director in management of a company conduct it's affairs in a manner which results in it's money and assets being siphoned off. In such circumstances, a clear case for oppression is made out.

[105] All the events as described in all the nine complains raised by UEM in this D3 Suit, taken jointly or severally, clearly indicate that the affairs of UEG were conducted in a manner which was oppressive to UEM and wholly disregarded its interest as shareholder of UEG. It is gravely oppressive to allow the continuance of UEG as a joint venture company where:

1. US$13,859,484.10 or RM52,666,040 due to UEG has been diverted to GIE to Singapore;
2. RM1,000,000 has been wrongfully siphoned off to GIE in Singapore and has now been spent;
3. Moneys of UEG are used for GlE's purposes;
4. Where the GIE nominated directors make secret profits, breach the fiduciary duties they owe to UEG and breach s. 131 of the Companies Act 1965;
5. No audited accounts of UEG have been filed for more than six years and the auditors have confirmed that they are still unable to finalise the audited accounts for the financial year ending 31 December 1999;
6. The financial position of UEG today is unknown;
7. Seow uses the staff of UEG for GIE projects without compensating UEG;

8. Seow manages UEG unilaterally without reference to the board of directors when by operation of art.s 72(h) he clearly is no longer even a director of UEG;

9. The UEM is denied the right to appoint directors of its choice;

10. UEM is prevented by Seow from replacing Azni Amran as it signatory to UEG's accounts despite the fact that Azni Amfran no longer represents UEM and has confessed to committing a criminal breach of trust in respect of RM375,000 belonging to UEG;

11. The directors nominated by UEM are denied access to UEG's offices, records and documents of UEG and are thereby prevented from discharging their duties as directors;

12. The board of directors of UEG is deadlocked and unable to function;

13. UEG operates in breach of the conditions imposed by the Foreign Investments Committee (FIC). It is almost inconceivable that UEM operates in breach of national policy as regards equity participation; and

15. Staff of UEG are incited against the directors of UEG nominated by UEM.

[106] Given the scale of wrongdoings, the absence of proper accounting records and the virtual impossibility to ascertain the true financial position of the company (UEG), a buy-out of GlE's shares in UEG by UEM is no longer a viable option. As a result of events which have occurred subsequently and taken together with the passage of time, the court finds that the most appropriate remedy in these circumstances is for UEG to be wound-up. UEG today is, in reality, an insolvent shall of a company, which is saddled with a massive loss of RM26.5 million. It is important to note that Seow testified in court that:

1. UEG has no money left. It has no cash balance left in its bank accounts;

2. UEG has no money to pay its creditors;

3. UEG has no money to pay salaries;

4. UEG has no money to pay any bills like electricity and utilities;

5. UEG has no projects or work left to do;

6. UEG's board of directors is deadlocked;

7. UEG's employees at its height, in 1999 numbered 130 employees, but now only six employees remain.

[107] Seow's admission that UEG is unable to pay it's creditors is highly significant, because, it is a clear admission that UEG is gravely insolvent. Therefore, the proper course would be for UEG to be wound-up. Given the circumstances as outlined above, the court is satisfied that there is no commercial reason to keep UEG alive as a company. Given oppression that has taken place and the dismal state of its accounting, a proper valuation of UEG for the purpose of a share buy-out would be impossible, particularly because it would appear that many GIE related transactions are unrecorded in UEG's accounts. Therefore, the most appropriate cause would be for UEG to be wound-up.

[108] Therefore, in respect of the D3 Suit, the court allows UEM's petition with costs and orders that the company, UEG be wound-up; and UEM be at a liberty to file for an application to appoint liquidators for the winding-up process.